In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-82

MICHAEL ANTHONY TOMEO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Although we acknowledged a conflict among the circuits on whether 18 U.S.C. 1084(a) prohibits the receiving as well as the sending of wagering information, we suggested that the present case does not provide a suitable vehicle for resolving that dispute. Among the reasons given for this position was that the indictment alleged and the evidence showed that petitioner *caused* the sending of such information by the other participant in the transaction. Thus, the conviction need not rest on petitioner's conduct in receiving the bets.

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In his Reply Brief, petitioner attempts to refute the contention that the conviction in this case may be sustained on the ground that he *caused* his bettor to use interstate wire facilities to transmit his wagers. Petitioner claims that this theory of the case was deliberately withdrawn from the jury's consideration. However, both government and defense counsel, in summation, argued the case on this theory, and the court instructed the jury on the issue. The colloquy quoted by the petitioner (Tr. 74–75; Reply Br. 3–4) deals only with whether a special instruction on 18 U.S.C. 2 should be given by the court.

1. In his summation defense counsel argued as follows (Tr. 83–84):

> Now, the evidence is clear that Mr. Tomeo [petitioner] never transmitted anything from Monroe, Wisconsin, to Denver, Colorado. The evidence before you is that Mr. Tomeo, so far as Huber [the bettor] was concerned, was never in Wisconsin. He couldn't transmit information from Wisconsin to Denver. But, then, also in this indictment the phrase is used, Michael Anthony Tomeo did knowingly use or cause to be used a wire communication facility. So I suppose sometime along the line although I haven't heard it yet, the government might say, "Well, Michael Anthony Tomeo caused Fred Huber to use the phone from Monroe, Wisconsin, to Denver, Colorado, to place bets." Well, I ask you, ladies and gentlemen, what evidence is there of that that Michael Tomeo caused Fred Huber to get on the telephone in Monroe, Wisconsin, or anyplace else that he travels to, and

place bets to Michael Tomeo in Denver? There just is absolutely no evidence of that. There is no evidence that Michael ever called—even initiated a call from Denver or anyplace else to Fred Huber in Monroe, Wisconsin, or anyplace else, and caused Fred Huber to place any bets. There is no such evidence here. No evidence that Michael Tomeo called Fred Huber anyplace. All of the evidence is that on these unspecified occasions that happened frequently during these two years that the calls were initiated by Fred Huber, as he said, most of the time from Wisconsin—No evidence of Michael Tomeo causing Fred Huber to do anything. And certainly no evidence of Michael Tomeo transmitting anything from Monroe, Wisconsin, to Denver, Colorado.

2. In response, the prosecutor argued (Tr. 86–87):

Mr. Huber testified he got the number from Mr. Tomeo. He was told to call to get the point spread. He was told to call to place his bets, and if he could not have had that number to call from Mr. Tomeo, he couldn't have called. Counsel argues that there is no evidence that Mr. Tomeo ever made a call from Monroe, Wisconsin. The indictment and the evidence is not that he made calls from Wisconsin, but he caused the use of this interstate facility, the telephone, from Monroe—I mean to Denver, and he caused Mr. Huber to use it for the purpose of getting information from him so that he could place bets—so that Mr. Huber could place bets with Mr. Tomeo.

3. In instructing the jury on the essential elements of the offense charged, the court set forth as one such element (Tr. 90);

> That the defendant used a wire communication facility for the transmission in interstate commerce from Monroe, Wisconsin, to Denver and Adams County, Colorado, or caused the use thereof.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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